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Nos. 14-556, 14-562, 14-571, 14-574

In The
Supreme Court of the United States

JAMES OBERGEFELL, et al.,

Petitioners,

v.

RICHARD HODGES,
Director, Ohio Department of Health, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
JEFFREY T. ROWES
ROBERT J. MCNAMARA*
ROBERT EVERETT JOHNSON
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
rmcnamara@ij.org
*Counsel of Record
Counsel for Amicus Curiae
Institute for Justice

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit law firm dedicated to the defense of free speech, school choice, economic liberty, and private property rights nationwide. Because the last two of these – the right to pursue a common occupation and the right to keep one's property – invoke rights that this Court has sometimes called "non-fundamental," the Institute frequently litigates in federal court under the rational-basis test.

Under the vision of the rational-basis test articulated by the Sixth Circuit below, the Institute would lose all of these cases – as, indeed, would every rational-basis plaintiff. But the Institute regularly *wins* rational-basis cases. *See, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012). The Institute is not alone in this – other plaintiffs also win rational-basis cases at every level, including before this Court. Under the Sixth Circuit's articulation of the rational-basis test in this case, however, that would be impossible. The court below described a test so thoroughly deferential and deliberately divorced from facts that no plaintiff could hope to prevail. Since plaintiffs *do* manage to prevail under the rational-basis test, the

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this *amicus* brief. No portion of this brief was authored by counsel for any party, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

description of the test in the opinion below must be wrong. And so it is.

The Institute's interest in this case is straightforward: The Sixth Circuit's articulation of the rational-basis test below introduces serious doctrinal errors that cannot be squared with this Court's precedent. Those errors, if adopted by this Court, would upend the rational-basis test as it is actually applied by the federal judiciary, with serious consequences for the Institute's clients as well as for the constitutional rights of all Americans. For that reason, the Institute submits this brief to explain how the Sixth Circuit's opinion departs from the ordinary practice of this Court and the courts of appeals and to urge this Court – regardless of its ultimate decision on the merits – not to incorporate these errors into its Fourteenth Amendment analysis.

SUMMARY OF THE ARGUMENT

In its decision below, the Sixth Circuit held that the plaintiffs' claims in this case were all governed by the rational-basis test. Pet. App. 31a-39a.[2] In applying that test, though, the Sixth Circuit articulated an erroneous version of rational-basis review under which the government must always win: a version under which basically any government end is

[2] "Pet. App." refers to the joint appendix filed in cases 14-556, 14-562, and 14-574.

legitimate, and one where facts can never be taken into account to question whether there is a "rational relationship" to the government's end. If, as the panel below seemed to conclude, the only limit on government power under the rational-basis test is the limit of the human imagination, then the many constitutional protections subject to rational-basis review are meaningless.

The panel's account of the rational-basis test is wrong. It does not describe the rational-basis test as it is actually applied by this Court, and it does not describe the rational-basis test as it is actually applied by lower courts.

As traditionally formulated, the rational-basis test has two parts, each of which imposes a meaningful constraint on government action: There must be a "legitimate end," and a challenged law or classification must have a "rational relationship" to that end.[3] The Sixth Circuit's analysis introduces errors into both prongs of the test.

First, the Sixth Circuit's description of the "legitimate interest" prong is so expansive as to mean that literally anything the government may wish to do is legitimate. The panel concluded, for example, that the government may assert a legitimate interest in promoting raw nepotism that benefits not the public, but

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[3] *E.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996) (noting that Equal Protection requires classification to "bear[ ] a rational relation to some legitimate end").

only connected insiders with the clout to secure valuable positions. This is not so: In this Court's application of the rational-basis test, it has made clear that some government interests are legitimate while others are not, and, where the government's interests are illegitimate, the challenged law fails.

Second, the Sixth Circuit suggests that the existence of a "rational relationship" must be determined in a factual vacuum. The panel, for example, deemed the trial in the Michigan case an elaborate irrelevance because rational-basis analysis takes place not in a courtroom but within the imagination, based solely on rational speculation. This, too, is not so: This Court has regularly examined the factual circumstances in which a law is being enforced to evaluate a law's rationality. To be sure, this Court's rational-basis analysis is deferential, but it defers to *reasonable policy judgments* not to *provably false facts*.

Simply put, the Sixth Circuit has articulated a version of the rational-basis test under which it is impossible for any plaintiff to win any rational-basis case. That is not the test articulated by this Court, and (excepting the opinion below) that is not the test actually applied by the courts of appeals. Thus, if this Court resolves this case under rational-basis review, it should do so under the actual rational-basis test, not the incorrect version set forth by the Sixth Circuit below.

ARGUMENT

In its opinion below, the Sixth Circuit outlined a vision of rational-basis review that is no review at all. According to the opinion below, the words "judicial restraint," together with respect for the "democratic process," allegedly "tell us all we need to know" about rational-basis review. Pet. App. 31a (internal quotation marks omitted).

If these two things told us all we needed to know in *this* case, though, they would tell us all we need to know in *every* case – namely, that the government always wins. But the Sixth Circuit's cramped view of the rational basis test is not the law. It was *never* the law, even at the height of the post-New Deal embrace of judicial deference. *See, e.g., Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring) (exclusion of former communist from legal profession violates due process because it "offends the dictates of reason"). It certainly is not the law today. To the contrary, this Court often looks for rationality and finds it lacking.[4]

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[4] *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (law concerning enactment of anti-discrimination measures fails rational basis scrutiny); *Quinn v. Millsap*, 491 U.S. 95, 107 (1989) (law limiting membership on governing board to property owners fails rational basis scrutiny); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 343-44 (1989) (tax assessment scheme fails rational basis scrutiny); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (permit requirement for group home for mentally retarded fails rational basis scrutiny); *Hooper v. Bernalillo Cnty. Assessor*, 472

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Adopting the lower court's view of the rational-basis test as one where anything goes and plaintiffs always lose would have serious consequences that resonate far beyond this case. Every area of activity deemed "non-fundamental" by this Court is subject to rational-basis review: The right of the monks of

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U.S. 612, 621-22 (1985) (law withholding tax exemption from new residents fails rational basis scrutiny); *Williams v. Vermont*, 472 U.S. 14, 23-24 (1985) (residency requirement for tax exemption fails rational basis scrutiny); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 875, 876 (1985) (discriminatory taxation of domestic and foreign corporations fails rational basis scrutiny); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (law barring undocumented children from public education fails rational basis scrutiny); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (law linking size of state benefit to duration of residency fails rational basis scrutiny); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651 (1975) (discrimination between widows and widowers in payment of Social Security benefits fails rational basis scrutiny); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974) (mandatory leave for pregnant employees fails rational basis scrutiny); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (law withholding Food Stamp benefits from households consisting of unrelated persons fails rational basis scrutiny); *James v. Strange*, 407 U.S. 128, 140 (1972) (law allowing state to recoup cost of criminal defense from indigent defendant fails rational basis scrutiny); *Lindsey v. Normet*, 405 U.S. 56, 78 (1972) (bond requirement to appeal class of landlord-tenant disputes fails rational basis scrutiny); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (law granting preference to males when appointing administrators of estates fails rational basis scrutiny); *Turner v. Fouche*, 396 U.S. 346, 364 (1970) (law limiting membership on governing board to property owners fails rational basis scrutiny); *see also United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting contention that "Congress could rationally have concluded that [possession of guns in school zones] substantially affects interstate commerce").

St. Joseph Abbey to sell caskets is governed by the rational-basis test. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221 (5th Cir. 2013). The right to be free from arbitrary taxation is governed by the rational-basis test. *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 343-44 (1989). Limitations on federal power are analyzed under the rational-basis test. *Cf. United States v. Morrison*, 529 U.S. 598, 608 n.3 (2000) (rejecting dissent's "remarkable theory that the commerce power is without judicially enforceable boundaries"). If the rational-basis test is the toothless fiction described by the majority below, all of these areas of constitutional law – and more – will be relegated to the unfettered discretion of legislators nationwide.

Fortunately, the rational-basis test is *not* a toothless fiction. As noted above, this Court has repeatedly found rationality lacking. And it has done so because, straightforwardly enough, the rational-basis test means what it says. Government action must be supported by a legitimate interest – which means this Court distinguishes between legitimate and illegitimate ends of government. And there must actually be a rational relationship between the government's action and some identifiable legitimate end – which requires an inquiry into the factual circumstances surrounding the government's action. To be sure, the government does not have an affirmative burden under the rational-basis test and it may invoke rational speculation to justify a challenged law, but a plaintiff may carry its burden of refuting a law's asserted

justifications by adducing evidence demonstrating that the government's speculation is false.

I. The Rational-Basis Test Requires An Actual Legitimate Interest.

According to the Sixth Circuit, under the rational basis test, "[s]o long as judges can conceive of some 'plausible' reason for the law . . . the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens." Pet. App. 31a. Indeed, "*any* plausible reason" will supposedly suffice: The Sixth Circuit gleans from this Court's precedent the notion that even "nepotism" without any connection to the public good would satisfy rational-basis scrutiny. *Id.* at 38a-39a.

If, as the Sixth Circuit concluded, shameless nepotism is a legitimate government interest, then every purpose is a legitimate government interest – including literally any conceivable purpose for granting the benefits of marriage to some couples but not others. Not so. This Court's precedents (including the cases relied on by the majority below) make clear that some purposes are legitimate while others are illegitimate. And they also make clear that *every* distinction drawn by a government actor must rationally relate to a legitimate purpose. Although these seem like elementary propositions, they eluded the Sixth Circuit, and this Court should not repeat the lower court's errors in its analysis.

A. Not Every Purpose Is Legitimate.

The Sixth Circuit was simply wrong to announce that "*any* plausible reason" for a law – including even pure nepotism – will pass muster under the rational-basis test. Pet. App. 38a. It is, of course, true that a law must have a plausible explanation; this Court regularly rejects laws because it finds the government's explanations *implausible*. *See infra* 16-20. But not just *any* plausible reason will do. Instead, this Court's precedents make clear that the government must have a "*legitimate* state purpose" for its law. *Ward*, 470 U.S. at 876 (emphasis added).

This Court has long recognized that a mere preference for one group over another is not a legitimate government purpose. *See* Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984) (collecting cases). In *Ward*, for instance, a State taxed out-of-state insurance companies at a higher rate than domestic companies. 470 U.S. at 871-72. That policy was not insane: Indeed, it was quite rational insofar as any "State's natural inclination frequently would be to prefer domestic business over foreign." *Id.* at 882. But the Court held that the State's preference for domestic business – however understandable – was not legitimate. *Id.* at 882 & n.10.[5] Because the very "function"

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[5] Indeed, this Court deemed the illegitimacy of naked economic protectionism so obvious that rational-basis review under the Equal Protection Clause – rather than a Commerce Clause

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of the rational-basis test is "to ensure that classifications rest on something other than a naked preference for one person or group," Sunstein, *supra*, at 1713, the existence of such a preference cannot be accepted as a legitimate purpose.[6]

The Sixth Circuit's suggestion that a law driven by "nepotism" could pass constitutional muster, Pet. App. 38a, flies in the face of this precedent. Nepotism, after all, is nothing more than a bare preference for a group.

The Sixth Circuit derives its nepotism analysis from this Court's decision in *Kotch v. Bd. of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552 (1947). But *Kotch* does not endorse government-sanctioned nepotism. Rather, as the Eighth Circuit has explained:

> *Kotch* proceeds from the assumption that a general associational preference for relatives, and a desire to help them, while quite understandable and thus rational in some sense, is *not* a reason for hiring someone that can withstand an equal protection objection. If it were sufficient, or even of legal relevance, we

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analysis – was sufficient to resolve the claim at issue. *Id.* at 880-81.

[6] *See also, e.g.*, *Cleburne*, 473 U.S. at 450 (striking down law that rested on "prejudice against the mentally retarded"); *Moreno*, 413 U.S. at 534 (striking down law that was "intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program").

> are confident that the Court would have said so.

Backlund v. Hessen, 104 F.3d 1031, 1033 (8th Cir. 1997) (emphasis added).[7] The only reason the Court in *Kotch* considered evidence that the challenged law tended to promote nepotism is that nepotism is *not* a legitimate interest, and therefore that evidence was harmful to the government's case. *See* 330 U.S. at 555-56. The Court ultimately upheld the law because of other, more persuasive evidence showing that the apprenticeship requirement served a *different* legitimate purpose – namely, to ensure the "safest and most efficiently operated pilotage system practicable." *Id.* at 564.

The contrary rule advanced below – embracing *any* "plausible" government purpose as legitimate – would have drastic implications well beyond this case. For example, several courts of appeals have recognized that the general rule against sheer favoritism in legislation means that states may not legitimately pass laws that serve no purpose beyond protecting industry incumbents from economic competition: When a group of monks in Louisiana sued to challenge a ban on retailing caskets, for instance, the Fifth Circuit rejected the suggestion that the law could be

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[7] The Eighth Circuit in *Backlund* held that an individual who applied to work as a firefighter stated an equal protection claim, where he alleged that the fire department "hired four firefighters, three of whom were related to either present or former Fire Department employees." 104 F.3d at 1032.

justified on the ground that it served to protect the funeral home industry from economic competition. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221-22 (5th Cir. 2013). According to that court: "[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose." *Id.* at 222; *see also Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (similar).[8]

Indeed, it seems doubtful that even the Sixth Circuit believes its own expansive rhetoric. In another case, also involving the casket industry, the Sixth Circuit held that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). But, sincere or not, the sweeping rhetoric in the opinion below could have significant consequences for future rational-basis cases. The version of the rational-basis test adopted by the Sixth Circuit in this case is untenable and – even more importantly – cannot be reconciled with the binding precedent of this Court. It should therefore be rejected.

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[8] Only one court of appeals has disagreed with this consensus (and even then only in *dicta*). *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004). But even in the Tenth Circuit, federal courts strike down laws that cannot rationally be thought to accomplish anything but enriching one group at the expense of another. *See Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012).

B. Each Line Drawn By The Legislature Must Have A Legitimate Purpose.

The Sixth Circuit is equally wrong to suggest that – so long as a law rationally advances some positive end – courts cannot question whether the legislature has "done too much or too little." Pet. App. 33a. In fact, that question of "fit" is precisely the focus of the rational-basis test in Equal Protection cases.

The Sixth Circuit's articulation of the rational-basis test would render Equal Protection analysis absurd: The entire point of an equal-protection challenge is that one group of people is being treated better than another. It is literally always the case that a classification accomplishes something positive because it is always true that a classification makes some people (the favored class) better off. No Equal Protection plaintiff can dispute the existence of some positive benefit flowing from a law they challenge; they can only argue that there is no good reason to exclude them from these positive benefits. According to the opinion below, these plaintiffs would simply always lose. But rational-basis plaintiffs do not always lose because the rational-basis test described below is not the law. *See supra* at 5-6 n.4 (collecting cases).

Once again, this Court's decision in *Ward* is highly instructive. There, the Court rejected the suggestion that favorable tax treatment for domestic corporations could survive rational basis scrutiny merely because it provided a benefit for the favored

corporations. While it was true that providing such a benefit was a rational state aim, the Court also had to look at who was *excluded* from the benefit – as, otherwise, "*any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." 470 U.S. at 882 n.10. The Court thus squarely rejected an analysis that (like the Sixth Circuit's analysis below) would look only to whether any benefit flowed from a law while ignoring the propriety of the line drawn by the legislature.

Indeed, the entire point of judicial review of legislative classifications is to police legislative line-drawing – to examine each distinction drawn by the government to ensure that it is at least rational. *E.g.*, *Zobel*, 457 U.S. at 60 ("When a state distributes benefits unequally, the *distinctions* it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." (emphasis added)); *accord Romer*, 517 U.S. at 632 ("[E]ven in the ordinary equal protection cases calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."). And time and again, this Court has rejected laws serving legitimate state interests because they sweep either too broadly or not broadly enough: The Court has invalidated measures designed to provide property owners with representation on local governing boards, *Quinn*, 491 U.S. at 107; to prevent double taxation of state residents, *Williams*, 472 U.S. at 23-24; to provide free public education to citizens, *Plyler*,

457 U.S. at 220; to provide benefits for widows, *Weinberger*, 420 U.S. at 651; and to prevent hunger, *Moreno*, 413 U.S. at 538, among other things. In each case, the Court has invalidated the law precisely because the legislature provided the benefit to either too few or too many – not because the government lacked a basis for providing the benefit to anyone at all.

* * *

A court's task in a rational-basis case involves more than considering whether a law is "irrational" in the simple sense of "unreasoned." After all, every government action is "rational" in some sense: "It is, in fact, hard to think of an action that does not have a reason." *Backlund*, 104 F.3d at 1033. The mere fact that a law is recognizable as a product of human cognition does not suffice to satisfy the Fourteenth Amendment. Instead, a court in a rational-basis case undertakes a more serious inquiry: whether the law or distinction at issue is addressed to a *legitimate*, rather than an illegitimate, end.

II. The Existence Of A "Rational Relationship" Depends On Facts.

The Sixth Circuit also erred by describing the "rational relationship" test as an abstract inquiry into the rationality of a law at the time it was passed – an inquiry that can never take any facts or evidence into account. This is incorrect on two scores. First, courts can (and do) look at facts in rational-basis cases when

plaintiffs can adequately prove those facts. And second, the appropriate factual inquiry is whether a rational relationship exists at the time a law is being enforced, not whether one existed whenever that law happened to be passed.

A. Facts Matter In Rational-Basis Cases.

The Sixth Circuit's opinion below describes a rational-basis test that occurs in a factual vacuum, where judges may never engage in fact-finding of any kind. Indeed, the Sixth Circuit said it was "hard to see the point" of a trial and findings of fact in a rational-basis case at all. Pet. App. 33a.[9]

But this backhanded rejection of any role for evidence in rational-basis cases again overlooks the fact that rational-basis plaintiffs actually win cases, and they do so because reviewing courts examine the underlying factual realities of those cases. *E.g.*, *Zobel*, 457 U.S. at 62 & n.9 (rejecting as implausible the idea that *new* residents would be attracted by a system that discriminated in favor of *long-term*

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[9] As with the Sixth Circuit's other errors in describing the rational-basis test, it is difficult to see the point of this sweeping rhetoric. After making the above-cited pronouncement, the Sixth Circuit's opinion proceeds to address the factual context of modern marriage law for several pages. Pet. App. 34a-37a. But, again, sweeping legal rhetoric has consequences, and – whatever its ruling in this case – this Court should avoid ratifying the Sixth Circuit's mistaken implication that facts are never relevant in rational-basis cases.

residents). The courts of appeals follow the same rule. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223-27 (5th Cir. 2013) (affirming finding of no rational basis for casket-sales law after bench trial); *Merrifield v. Lockyer*, 547 F.3d 978, 990-92 (9th Cir. 2008) (finding no rational basis for pest-control ordinance based on summary-judgment record).

And once again, the opinion below does not even correctly describe the rational-basis test as it is applied by the Sixth Circuit itself in other cases. *See Loesel v. City of Frankenmuth,* 692 F.3d 452, 465-66 (6th Cir. 2012) (affirming finding of no rational basis for zoning classification after jury trial); *Craigmiles*, 312 F.3d 220, 222 (6th Cir. 2002) (affirming finding of no rational basis for casket-sales law after bench trial). Where facts are relevant in rational-basis cases – plaintiffs, for example, may adduce evidence disproving the government's speculation and thereby refute the government's justification for a law – courts inquire into the facts just as they do in any other case. The Sixth Circuit's suggestion to the contrary is simply mistaken, and holding otherwise would upend decades of settled rational-basis case-law.

Fundamentally, the Sixth Circuit's error stems from its misreading of *dicta* in *FCC v. Beach Communications* noting that a governmental classification "may rest on 'rational speculation unsupported by evidence or empirical data.'" Pet. App. 33a (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). This does not mean, as the Sixth Circuit

would have it, that courts in rational-basis cases make no inquiry into the underlying facts of the cases before them. Instead, read in context, the *Beach Communications dicta* merely reaffirms the uncontroversial proposition that rational-basis review, unlike heightened scrutiny, is satisfied so long as there is a factually plausible legitimate explanation for a law. In other words, courts do not generally evaluate rational-basis cases by subjecting legislators to cross-examination about what "actually motivated" them, and they similarly do not require the government to meet an affirmative evidentiary burden "explaining the distinction on the record." *Beach Commc'ns*, 508 U.S. at 315 (internal citations and quotation marks omitted).

But nothing about these basic truths – and nothing in the *Beach Communications* opinion – invalidates or even contradicts the longstanding principle that plaintiffs have the opportunity to introduce evidence showing that the government's explanation for its law is actually *implausible*. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. . . ." (internal citations omitted)); *accord Zobel*, 457 U.S. at 62-63 (rejecting proposed explanations for state-benefits distribution as implausible).

Beach Communications did not purport to overrule this line of cases; instead, it reaffirmed it. For

example, this Court's opinion in *Beach Communications* cited *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), without finding it necessary to disavow that case's assertion that the Court will reject asserted legislative objectives when "an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" *Clover Leaf Creamery*, 449 U.S. at 463 n.7 (quoting *Weinberger*, 420 U.S. at 648 n.16); *cf. Beach Commc'ns*, 508 U.S. at 315 (citing *Clover Leaf Creamery*, 449 U.S. at 464). And, indeed, in the wake of *Beach Communications*, this Court has continued to examine facts in the rational-basis context. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served").

Undoubtedly, the rational-basis test requires deference, but it requires deference to *reasonable policy judgments*, not deference to *provably false facts*. This is true both in cases where the government loses and in cases where the government wins. Take, for example, *Heller v. Doe*, 509 U.S. 312 (1993), in which this Court upheld a Kentucky law that allowed a person with mental retardation to be involuntarily committed based on "clear and convincing evidence" while a mentally ill person could only be committed based on a showing "beyond a reasonable doubt." *Id.* at 315. Kentucky explained its law by saying that its policy

was to equalize the risk of erroneous confinement between people with mental illness and people with mental retardation, and that the lower standard of proof advanced this goal because mental retardation was less likely to be misdiagnosed than was mental illness. *Id.* at 322. The Court *deferred* to the State's asserted policy decision to equalize risk between these two groups. *Id.* at 322 n.1. But, in evaluating whether there was a *rational relationship* between the State's asserted end and its chosen means, the Court specifically referred to *facts*, finding that there was "a sufficient basis in fact" to believe that there was actually less risk of misdiagnosing mental retardation. *Id.* at 322.[10]

As the above cases show, this Court has never embraced the proposition that facts are categorically irrelevant in rational-basis cases; neither has it adopted a rule where rational-basis plaintiffs are not allowed to disprove the speculation supporting the government's justification for a law. Instead, it has repeatedly said the very opposite. The Sixth Circuit's contrary conclusion in this case was error and should be rejected.

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[10] *Heller* was decided on a summary-judgment record. *Id.* at 318.

B. The Relevant Inquiry Is Whether A Law Is Rational When It Is Applied, Not Whether It Was Rational Whenever It Happened To Pass.

The Sixth Circuit's final doctrinal error concerns the question of *when* a law must be rational. Must a law be rational today when the government actually enforces it against someone, or is it sufficient that the law may have been rational in the abstract at the moment of its passage long ago? The Sixth Circuit suggests that the former is the rule: "The fair question is whether in 2004 . . . Michigan voters could stand by the traditional definition of marriage." Pet. App. 34a.

The Sixth Circuit is wrong. This Court has recognized since the inception of the modern rational-basis test that a law that may have once been rational can be rendered irrational due to changed factual circumstances of the world. *Carolene Prods.*, 304 U.S. at 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). Indeed, the filled-milk statute upheld in *Carolene Products* was invalidated a little over thirty years later when fundamental changes in the filled-milk industry rendered its continued application irrational. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 224 (N.D. Ill. 1972).

Other courts of appeals have long recognized this changed-circumstances doctrine in the rational-basis context. *See, e.g.*, *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (reversing a dismissal of a twenty-year-old challenge to a pit-bull ban because under the allegations of the Complaint "although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational"); *Seaboard Air Line R.R. Co. v. City of West Palm Beach*, 373 F.2d 328, 329 n.3 (5th Cir. 1967) (stating that "the slightest reflection would disclose the fallacy of a rule which would require a determination of the reasonableness of a long-standing ordinance in the light of circumstances and conditions that may have existed at the time of its adoption").

The idea that "changed circumstances" matter is not a unique feature of rational-basis review; it is simply a feature of any kind of constitutional review. Indeed, the relevance of changed circumstances is uncontroversial in other contexts. For example, in *McCutcheon v. FCC*, 134 S. Ct. 1434, 1456 (2014), this Court refused to evaluate the rationality of aggregate limits on campaign contributions in light of the outdated facts present when the Court had originally upheld aggregate limits in 1976 and instead evaluated those limits in light of modern experience. This Court also recently struck down parts of the Voting Rights Act of 1965 that certain jurisdictions were required to implement to guarantee ballot access

because those measures were predicated on "decades-old data and eradicated practices." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2617 (2013). Finally, this Court explained in *Granholm v. Heald*, 544 U.S. 460 (2005), that states' "health and safety" justifications for bans on direct shipment of wine by out-of-state wineries have been made obsolete by advances in technology that have allowed state regulatory bodies to monitor out-of-state wineries cheaply, easily, and efficiently. *Id.* at 492 (striking down states' laws burdening or prohibiting direct shipment of wine from out-of-state wineries).

To be sure, it may not be necessary for this Court to predicate its decision on the merits of the changed-circumstances doctrine – after all, the laws challenged here were passed only ten years ago, and the Court may well find that the outcome of the case would be the same in 2004 as it will be in 2015. But the Sixth Circuit's casual announcement that the only "fair question" is whether a law is rational when passed would radically change the law in other cases. It would mean, for example, that a plaintiff challenging a law passed in 1924 to protect a city's streetcar industry would be unable to point out to a court that the streetcar industry had ceased to exist 70 years later. *Cf. Santos v. City of Houston*, 852 F. Supp. 601, 608-09 (S.D. Tex. 1994).

* * *

Whenever this Court has decided a rational-basis case, it has looked for a factually plausible (that is, a "rational") connection between the government's actions and some legitimate end. The courts of appeals, following that precedent, do the same. Adopting the view of the rational-basis test articulated by the majority below would put an end to this longstanding practice: It would replace *deferential* review with no review at all. But neither judicial deference nor judicial humility requires judicial abdication or judicial blindness.

To the extent this Court applies rational-basis review to this case, it should make clear that the test applies the way it always has – with deference tempered by an understanding of factual reality. The precedents of this Court, as well as the many lower-court decisions relying on those precedents, require nothing less.

CONCLUSION

The rational-basis test described by the Sixth Circuit below bears little resemblance to the test actually applied by this Court and by the courts of

appeals. This Court should reject the serious doctrinal errors of the opinion below.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
JEFFREY T. ROWES
ROBERT J. MCNAMARA*
ROBERT EVERETT JOHNSON
901 North Glebe Road
Suite 900
Arlington, Virginia 22203
(703) 682-9320
rmcnamara@ij.org
*Counsel of Record
Counsel for Amicus Curiae
Institute for Justice